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No. 07-445

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In The

Supreme Court of the United States

ALICE H. MORGAN, TRUSTEE OF THE MORGAN FAMILY TRUST UNDER AGREEMENT DATED SEPTEMBER 20, 1990, AS AMENDED,

Petitioner,

v.

CHICAGO TITLE INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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COUNTER-STATEMENT AND REORDERING OF THE QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition where the Ninth Circuit Court of Appeals' ("Ninth Circuit") Memorandum of Opinion filed April 6, 2007, affirming in part and reversing in part the judgment of the District Court ("Memorandum of Opinion"), followed the decisions of this Court and properly determined that the District Court followed Hawai'i law regarding the burden of proof in insurance coverage disputes.

II. Whether Petitioner has presented compelling reasons to grant the Petition where the Ninth Circuit's Memorandum of Opinion correctly recognized that the District Court did not "revisit" its order on partial summary judgment, but instead issued a well-reasoned decision on a matter attendant thereto but not previously determined.

III. Whether Petitioner has presented compelling reasons to grant the Petition where the Ninth Circuit's Memorandum of Opinion correctly recognized the sufficiency of the District Court's Findings and Conclusions of Law and adequately stated its own decision.

CORPORATE DISCLOSURE

Defendant-Appellee CHICAGO TITLE INSURANCE COMPANY ("Chicago Title"), by and through its attorneys, Alston Hunt Floyd & Ing, makes the following corporate disclosure:

Chicago Title is a Missouri corporation. It is wholly owned by Chicago Title & Trust Company, Chicago Title & Trust Company is wholly owned by Fidelity National Financial, Inc. Fidelity National Financial, Inc. is a publicly-traded company whose symbol is "FNF" on the New York Stock Exchange.

LIST OF PARTIES

The parties below were Albert R. Morgan, Jr. and Alice H. Morgan, Trustees of the Morgan Family Revocable Living Trust under Agreement dated September 20, 1990, as amended, plaintiffs and appellants, and Chicago Title Insurance Company, defendant and appellee.

Albert R. Morgan, Jr. is now deceased. Petitioner, plaintiff-appellant in the court below, is Alice H. Morgan, Trustee of the Morgan Family Trust Under Agreement Dated September 20, 1990, As Amended ("Petitioner").

Respondent is Chicago Title Insurance Company, defendant-appellee in the court below ("Chicago Title").

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OPINIONS BELOW

The first Ninth Circuit decision in this action is set forth at 65 Fed. Appx. 184. No other matters in this action are reported.

The Ninth Circuit's Memorandum and Order is set forth in Petitioner's Appendix at pp. A-1 through A-5. Some of the District Court findings, conclusions and orders reviewed by the Ninth Circuit are in Petitioner's App. at pp. A-19 through A-25, A-26 through A-32, and A-33 through A-40.

Additional orders relevant to the Ninth Circuit's Memorandum of Opinion is set forth in the Appendix hereto at App. p. 1 and App. p. 6.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rules of the Supreme Court of the United States, Rule 10, which provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

28 USC § 1738, which provides:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Article IV, Section 1 of the United States Constitution, which provides:

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Rule 52(a) of the Federal Rules of Civil Procedure, which provides:

> **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to

> Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

Rule 52(c) of the Federal Rules of Civil Procedure, which provides:

> **Judgment on Partial Findings.** If during a trial without jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to

render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

STATEMENT OF THE CASE[1]

In this action, Petitioner sought recovery of fees, costs and other damages allegedly incurred in a residential real estate foreclosure filed by Petitioner in the Fifth Circuit Court, State of Hawai'i ("State Court"), *Morgan v. Kerr,* Civil No. 93-0199 (1993) ("Foreclosure"). In 1991, Petitioner loaned $300,000 to Edgar Kerr ("Kerr") and took a mortgage on a residence at Princeville, Kauai, Hawai'i as security. Petitioner obtained a Loan Policy of Title Insurance ("Policy") from Chicago Title through its policy-issuing agent, First Hawaii Title Corporation ("FHTC"). Kerr defaulted and in 1993, Petitioner filed the Foreclosure against him and others, including Rosetta Ann Dimiceli ("Dimiceli"), the vendee/grantee under an Agreement of Sale and Satisfaction Deed, both from Kerr as vendor/grantor, for the mortgaged property. Both documents were recorded after the date of the mortgage and the Policy.

[1] In addition to the facts set forth herein, Chicago Title specifically disputes certain facts and issues raised below in its "Reasons for Denying the Writ" below.

After Petitioner's first motion for summary judgment in the Foreclosure was denied, Petitioner's counsel sent a letter dated April 20, 1994 to FHTC (the "Letter") advising of a possible claim against title.[2] FHTC filed the Letter after noting it was for "info. only" and did not forward it to Chicago Title. Chicago Title did not respond to the Letter in 1994, of course, because it did not possess a copy of the Letter.

Five years later, after the Foreclosure was completed and the appeal to the Hawai'i Supreme Court settled before a decision was issued, Petitioner's counsel, Steven Jacobson ("Jacobson"), sent Chicago Title a copy of the Letter requesting reconsideration of Petitioner's claim. After investigation, Chicago Title denied the claim. Petitioner filed this action on February 22, 2000, seeking to recover, among other things, attorneys' fees and costs incurred in prosecuting the Foreclosure plus the amount of a judgment against Dimiceli and the amount of a deficiency judgment against Kerr that Petitioner claims should

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[2] The Letter noted that Dimiceli was "claiming an interest in the property by reason of an Agreement of Sale entered into between her and Kerr on May 9, 1992, and recorded on July 28, 1992" and was entered into the District Court's record as Trial Exhibit No. 2. This was the Agreement of Sale mentioned in Petitioner's foreclosure complaint, and the very reason Dimiceli was made a party to the Foreclosure in the first place. On appeal (No. 02-16141), the Ninth Circuit determined that the Letter was sufficient notice under the Policy to trigger Chicago Title's duty to defend Petitioner against a possible covered claim.

also have been (but was not) entered against Dimiceli in the Foreclosure.

In the complaint, and contrary to her statement in the Petition, Petitioner did **not** specifically seek recovery of any alleged "judgment" against Kerr for $131,931.30 in attorneys' fees. Rather, Petitioner claimed more generally (1) breach of insurance contract (the Policy), and (2) bad faith, for which Petitioner sought punitive damages. Petitioner sought recovery of (a) attorneys' fees and costs incurred in the Foreclosure and losses attributable to an "unfavorable settlement" of the Foreclosure, and (b) $1,000,000.00 in punitive damages for Chicago Title's alleged bad faith. After Chicago Title was granted summary judgment on Petitioner's bad faith and punitive damage claims, the only issue for trial was the amount of damages to which Petitioner was entitled, *i.e.*, the amount of attorneys' fees reasonably and necessarily incurred in the Foreclosure for the defense of a claim covered under the Policy, and other compensatory damages.

At trial in May 2005, Petitioner called only one witness: an expert on the prevailing rates for commercial litigation (but not residential foreclosure) attorneys during the period of the Foreclosure. Petitioner's counsel herein was also her counsel in the Foreclosure, *i.e.*, Jacobson. Although listed as a potential witness and present at trial, Petitioner elected not to call Jacobson to testify about the work performed and the fees and costs incurred in the Foreclosure. Petitioner submitted stacks of pleadings

and attorneys' invoices for work allegedly incurred in the Foreclosure, but offered no testimony explaining (1) how the fees and costs shown in the invoices were incurred, and (2) if and how the fees related to the Foreclosure, generally, or the defense of a covered claim, specifically. Petitioner apparently expected the District Court and Chicago Title to sift through thousands of pages of invoices and Foreclosure filings to determine (1) which claimed charges related to what (if any) work in the Foreclosure, and (2) whether any work and charges related to defense of a covered claim and was reasonable and necessary.

In the Petition for Writ of Certiorari, Petitioner states that she sought recovery of the $131,931.30 attorney fee award against Edgar Kerr below, and that she is entitled to those fees based on the "collateral estoppel effect" of state court judgments. Contrary to Petitioner's contention, there is no specific "judgment" for attorneys' fees totaling $131,931.30. For this claim, Petitioner relies on the Deficiency Judgment against Kerr and others. *See* Petitioner's App. at pp. A-50 – A-51. As to Kerr, the Deficiency Judgment merely states, in relevant part:

> 1. Plaintiffs shall have and recover from Defendants Edgar D. Kerr ("Kerr"), Kauai Services, Inc., Dennis S. Nimkie and Greta L. Nimkie, jointly and severally, the principal amount of $295,877.20, plus interest of $113.49 per day and attorneys' fees of $28.37 per day from and after July 2, 1996 until the day this judgment is entered.

Further, Petitioner omits key facts from her contentions.[3]

First, Petitioner fails to note that the Deficiency Judgment (Petitioner's App. at pp. A-50 – A-51) upon which she relies for the $131,931.30 fees and costs claim is **not** against Dimiceli, but against only other defendants. *See* Petition at 6.

Second, Petitioner fails to explain that the other document upon which she relies (Petitioner's App. at pp. A-60 – A-61) is a motion she filed, not an order or judgment of the State Court. *See* Petition at 6.

Third, Petitioner fails to disclose that in the invoices submitted in evidence, Petitioner deleted many entries (including fees included in the $131,931.30 claim) because Petitioner recognized those fees did not pertain to defense of a covered claim, and were thus not recoverable against Chicago Title.

Fourth, Petitioner's statement of what she claimed in the District Court is not entirely accurate. While the Foreclosure pleadings in evidence include the State Court orders and judgments, Petitioner did not rely on the Deficiency Judgment for her fees and costs claim, except to the extent she sought recovery of the fees associated with its drafting for the State

[3] Respondent will address the merits of the collateral estoppel argument in its legal argument section, *infra*.

Court.[4] Indeed, Petitioner did not rely on this argument to the Ninth Circuit.[5] There, as in the District Court, she based her claim for fees and costs on counsel's invoices, the entire State Court record and the expert testimony. Significantly, in her Opening Brief to the Ninth Circuit Petitioner stated: "Morgan's request for an award of fees relating to the state court action does *not* seek all their fees incurred therein." (Opening Brief pp. 20, 38, emphasis in original.) She then went on to explain, for the first time, that she had been paid some of the fees awarded in the Foreclosure.

Despite Petitioner's implicit recognition that she was not entitled to reimbursement of all the fees and costs reflected in the evidence since they were not all incurred defending a covered claim, Petitioner failed to offer any testimony or other evidence showing which, if any, fees and costs reflected in the invoices were reasonable and necessarily incurred in the Foreclosure or in defense against covered claims. As a result, the District Court correctly determined that Petitioner did not meet her burden of proof to establish a *prima facie* showing that the attorneys' fees

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[4] Collateral estoppel is mentioned but once and the arguments consumes only two sentences in Petitioner's 35-page Trial Brief. (Petitioner's Trial Brief in the United States District Court, District of Hawai'i Civil No. 00-00145 BMK, page 21.)

[5] Petitioner merely mentioned that Chicago Title "cannot challenge the state court's determinations" in a footnote. Opening Brief p. 38, n.10.

and costs were incurred defending a covered claim and were reasonable and necessary. The District Court correctly entered judgment in favor of Petitioner for only nominal damages, $1.00.

Petitioner also neglects to disclose that the "$295,877.20 surrendered deficiency claim" was not against Dimiceli. While the Deficiency Judgment against Kerr was for that amount, the State Court correctly determined that Kerr's and Dimiceli's liability were not identical. There was no $295,877.20 judgment against Dimiceli "given up" by Petitioner. The $295,877.20 amount represents the amount Petitioner claims the state court **should have** entered against Dimiceli, not an actual judgment.[6] Petitioner is unhappy with certain rulings of the State Court, but she is not entitled to any issue preclusion based on non-existent judgments.

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[6] Petitioner contended below that the Order Granting in Part and Denying in Part (1) Defendant Dimiceli's Motion to Alter or Amend Judgment and for Other Relief, filed April 25, 1996; (2) Defendant Dimiceli's Motion for relief, filed November 27, 1996; and (3) Plaintiffs' Motion for Entry of Final Deficiency Judgment, filed December 5, 1996, filed June 26, 1998 (the "June 26, 1998 Order") were incorrect. The June 26, 1998 Order amended the Order (1) Granting Plaintiffs' motion filed September 29, 1995, for Partial Summary and Default Judgment, Decree of Foreclosure and Order of Sale, and (2) Denying Defendant Dimiceli's Non-Hearing Motion, filed October 16, 1995, to Modify August 26, 1994 Order was filed on December 7, 1995 (the "December 7, 1995 Order"). App. p. 6.

The Ninth Circuit affirmed in part, reversed in part, and remanded certain issues for further consideration. Specifically, the Ninth Circuit:

- agreed Petitioner failed to prove the attorneys' fees and costs sought were related to the defense of the covered claims and were reasonable and necessary, as required by Hawai'i law,
- agreed Petitioner failed to prove "with reasonable certainty" the value of her surrender of a claim already dismissed by the State Court (*i.e.*, the claim against Dimiceli), and
- held the District Court's conclusions were not contrary to the District Court's prior order on summary judgment. The summary judgment ruling related only to the burden of proving allocability of defense costs between covered and non-covered claims; it did not absolve Petitioner from making the initial showing that the fees and costs were necessary and reasonable and related to defense of covered claims.

Petitioner's App. at pp. A-1 – A-5.

SUMMARY OF ARGUMENT

The Ninth Circuit followed the decisions of this Court and properly determined that the District

Court followed Hawai'i law regarding the burden of proof in insurance coverage disputes.

The Ninth Circuit correctly recognized that the District Court did not "revisit" its order on partial summary judgment, but instead issued a well-reasoned decision on a matter attendant thereto but not previously determined.

The District Court's findings of fact and conclusions of law properly set forth the basis for its ruling.

The Ninth Circuit's Memorandum of Decision filed April 6, 2007 adequately set forth the basis of its decision.

REASONS FOR DENYING THE WRIT

Review pursuant to a writ of certiorari is discretionary, not obligatory. Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10.

A petition for a writ of certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. In considering petitions for certiorari, it is inappropriate to grant certiorari where there is no showing that a Circuit Court of Appeals decided an important question of local law in conflict with applicable local decisions. *Ruhlin v. New York Life Ins. Co.,* 304 U.S. 202, 206 (1938). It is also inappropriate to grant certiorari

where a petitioner does not show a decision was probably in conflict with yet unannounced state law. *Id.* Issues of state law will not be considered on certiorari where a decision cannot reconcile any "conflict of circuits," or do more than enunciate a tentative rule to guide particular federal courts. *Id.*

Issues for consideration in petitions for writ of certiorari were well summarized in *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1954):

> . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Court of Appeals.

Rice, 349 U.S. at 619-620. Petitioner raises no issue of public importance, merely her personal disagreement with and professed inability to understand the decisions below. As demonstrated herein, the District Court and Ninth Circuit decisions were consistently and appropriately adjudicated. None of the grounds for granting a writ of certiorari exist. Review of the Ninth Circuit's Memorandum of Decision by this Court is unwarranted, and the Petition for Writ of Certiorari should be denied.

I. THE NINTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S APPLICATION OF *SENTINEL*[7] AND FOLLOWED THIS COURT'S HOLDINGS ON THE PRECLUSIVE EFFECT OF STATE COURT DETERMINATIONS IN FEDERAL DIVERSITY ACTIONS

Petitioner obliquely argues that she was entitled to have the District Court apply the doctrine of collateral estoppel to prevent Chicago Title from disputing her claim for fees and costs. Petitioner is wrong. *Migra v. Warren City School District Board of Education,* 465 U.S. 75, 81, 102 S. Ct. 892, 896, 79 L.Ed.2d 56, 61 (1984) states "that a federal court must give to a state court **judgment** the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." (Emphasis added.)

Hawai'i recognizes both *res judicata, i.e.,* claim preclusion, and collateral estoppel, *i.e.,* issue preclusion. *Exotics Hawaii-Kona, Inc. v. E.I. Dupont DeNemours & Company,* 104 Hawai'i 358, 364, 90 P.2d 250, 256 (2004). Petitioner is obviously asserting issue preclusion which "applies to a subsequent suit between the same parties or their privies on a different cause of action." *Id.,* 104 Hawai'i at 257, 90 P.2d at 365. In doing so, Petitioner bore the burden of establishing that:

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[7] *Sentinel Insurance Co. v. First Insurance Company of Hawaii,* 76 Hawai'i 277, 875 P.2d 894 (1994).

> (1) the issue decided in the prior adjudication is identical to the one presented in the action in question;
>
> (2) there is a final judgment on the merits;
>
> (3) the issue decided in the prior adjudication was essential to the final judgment; and
>
> (4) the party against whom issue preclusion is asserted was a party or in privity with a party to the prior adjudication.

Id., quoting *Bremer v. Weeks,* 104 Hawai'i 43, 54, 85 P.2d 150, 161 (2004). Here, Petitioner urges the application of non-mutual offensive issue preclusion. *Id.* In other words, she wishes to use rulings in the Foreclosure to bind Chicago Title and the courts below to the State Court determinations regarding the claim for fees and costs and the $295,877.20 Deficiency Judgment against Kerr. Petitioner is wrong because the necessary requirements for issue preclusion are not present.

As to the first requirement, the issues decided in the Foreclosure are not identical to those in question here. To the extent the Deficiency Judgment addressed fees and costs they were for the entire foreclosure against Kerr, including fees for claims and defenses that had nothing to do with defense of a covered claim. The $295,877.20 Deficiency Judgment against Kerr is not the same claim that Petitioner asserted against Dimiceli, the claim for which Petitioner seeks recovery from Chicago Title. The claim against Kerr was on the note and mortgage, while the claim against Dimiceli was on the Satisfaction Deed.

The State Court correctly determined that while Dimiceli took the property subject to the mortgage, she had not assumed the note and mortgage.

As to the second requirement, there was no final judgment against Dimiceli since the claims between her and Petitioner were voluntarily dismissed in the settlement.

As to the third element, it was not essential for the State Court to determine the fees and costs related to the defense of a covered claim asserted by Dimiceli in order to render an award for fees and costs arising out of the note and mortgage against Kerr. Nor was it necessary for the State Court to decide whether Dimiceli was liable to Petitioner under the Satisfaction Deed in order to determine Kerr's liability under the note and mortgage.

As to the fourth requirement, privity is a label that simply expresses a conclusion that preclusion is proper. *Flores v. Barretto,* 99 Hawai'i 270, 279, 54 P.3d 441, 450 (2002), citing *Bush v. Watson*, 81 Hawai'i 474, 480, 918 P.2d 1130, 1136, *reconsideration denied*, 81 Hawai'i 474, 918 P.2d 1130 (1996) (citation omitted). Under Hawai'i law it is within the trial judge's discretion to determine whether offensive preclusion would be unfair to a defendant not a party to the prior action. *Exotics Hawaii-Kona, Inc.,* 104 Hawai'i at 260-261, 90 P.2d at 368-369. Since the District Court decided that Petitioner had failed to prove her damages, it obviously determined that application of offensive issue preclusion would have been unfair to Chicago Title. Because the issue preclusion

theory was so minor, the District Court was not obligated to say more.[8]

The Ninth Circuit properly affirmed the District Court's determinations because the District Court gave the appropriate consideration to any preclusive effect of the Foreclosure rulings in rendering its decision. Petitioner, however, (1) misunderstands the preclusive effect of the State Court determinations, and (2) mischaracterizes the nature of the decisions made by the State Court.

First, Petitioner claims the State Court judgment regarding fees and costs against Kerr for the entire Foreclosure precluded Chicago Title from disputing Petitioner's claims for the fees and costs for defending against covered claims made by Dimiceli. Petitioner is wrong and *Sentinel, supra,* does not support Petitioner's conclusion. In *Sentinel,* the court adopted a case-by-case rule for determining whether an insurer was obligated to indemnify as a result of its breach of its duty to defend. *Sentinel,* 76 Hawai'i at 296, 875 P.2d at 913. The court specifically recognized that collateral estoppel effects in insurance cases should

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[8] Courts in the Ninth Circuit are guided by *Carr v. Yokohama Specie Bank, Ltd.,* 200 F.2d 251 (9th Cir. 1952) with respect to the sufficiency of findings under Fed. R. Civ. P. Rule 52. It is not necessary "that the trial court make findings asserting the negative of each issue of fact raised. It is sufficient if the special affirmative facts found by the court, construed as a whole, negative each rejected contention." *Carr v. Yokohama,* 200 F.2d at 255.

be limited. *Sentinel*, 76 Hawai'i at 295-296, 875 P.2d at 912-913.[9] *Sentinel* also recognized that in cases where an insurer consistently argues that there is no coverage, there is no estoppel because blanket application would provide the insured a windfall since it would receive a benefit for which it had not bargained. *Id.* "[E]quity requires that the consequences of an insurer's breach of its duty to defend must be considered on a case by case basis." *Id.*, 76 Hawai'i at 294-295, 875 P.2d at 911-912. Chicago Title has consistently argued that there was no coverage for Dimiceli's claims.

Here, the State Court did **not** make any determination, explicit or implicit, regarding the amount of fees and costs awarded against Kerr which could have been utilized in the District Court's analysis of the fees and costs for defense of covered claims asserted by Dimiceli. "The insurer is not bound . . . as to issues not necessarily adjudicated in the prior action and can still present any defense not inconsistent with the judgment." *Hogan v. Midland National Ins. Co.*, 3 Cal.3d 553, 564, 476 P.2d 825, 832 (1970).

The so-called $131,931.30 "award" for fees and costs related to the **entire** Foreclosure, not simply for

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[9] Estoppel may be appropriate "where the insured has been prejudiced in some way by the insurer's failure to provide a defense . . . or where the insurer has taken inconsistent positions with regard to defense and coverage." 76 Hawai'i at 296. The record demonstrates, however, that such circumstances were not present here, nor does Petitioner claim they were.

claims covered under the Policy. The fees and costs incurred by Petitioner to pursue a foreclosure remedy are not recoverable from Chicago Title since it was not the cause of those fees; Chicago Title did not default on the note and mortgage and cause Petitioner to incur fees to recover the debt by foreclosing against the property. In order to decide the unadjudicated issue of the fees and costs to defend against covered claims, the District Court needed evidence thereof from Petitioner, which, of course, was not provided at trial.

Second, Petitioner claims the District Court should have given preclusive effect to a judgment not entered against Dimiceli. While the State Court initially ruled that Dimiceli was liable for $277,203.35 pursuant to the Satisfaction Deed (Petitioner's App. at pp. A-47 – A-48), but not the $295,877.20 Deficiency Judgment against Kerr (Petitioner's App. at pp. A-41 – A-49) that Petitioner claims, it **reversed** its ruling regarding Dimiceli's liability, amended the earlier judgment and did not enter judgment against her for that claim (Petitioner's App. at pp. A-50 – A-52). And, Petitioner voluntarily dismissed all claims against Dimiceli, leaving no final judgment against her on any claim. Petitioner evidently expects issue preclusion be given to a claim/judgment no longer in existence because it "might" have been reversed on appeal. Petitioner is wrong. Without a judgment against Dimiceli for a deficiency which was covered under the Policy, there can be no preclusion and no determination that

Chicago Title is liable to Petitioner for that amount based on any theory. Petitioner's "wish" for a greater award does not mean Chicago Title is obligated to pay it.

Migra, supra, requires federal courts to give a state court **judgment** the same preclusive effect that the state court would give that judgment. *Id.*, 465 U.S. at 81. Here, under Hawai'i law the $131,931.30 award for fees and costs has no preclusive effect because it was not against Dimiceli. In addition, it did not make any determination as to which, if any, fees and costs related to the defense of covered claims, and determination of those issues was not essential to the Deficiency Judgment. Under Hawai'i law, the $295,877.20 Deficiency Judgment against Kerr has no preclusive effect because (a) it was not against Dimiceli, (b) the State Court determined she had no liability for that amount, and (c) all claims against Dimiceli were voluntarily dismissed.

Petitioner may not like the result, but the District Court and the Ninth Circuit complied with Hawai'i law and Federal authority requiring application of Hawai'i law.

II. THE DISTRICT COURT APPLIED THE PROPER BURDEN OF PROOF CONSISTENT WITH ITS PRIOR RULINGS; THE NINTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S APPLICATION OF THE BURDEN OF PROOF

Petitioner claims the Ninth Circuit chose not to rule on what Petitioner calls the District Court's "change of mind." Petitioner is wrong. The Ninth Circuit specifically found that the District Court did not change its mind and its ruling was consistent:

> **The district court's conclusion** that the Morgans failed to prove these damages **was not contrary to its prior order, which related only to the burden of proving allocability of defense costs.**

Petitioner's App. at p. A-3.

The Ninth Circuit's analysis was correct. In the October 14, 2004 Order Granting Summary Judgment (Petitioner's App. at pp. A-6 – A-15), the District Court found that in Chicago Title's motion for summary judgment it did not present evidence as to **allocability** apart from stating "which claims were covered and which were not." Petitioner's App. at p. A-14. The District Court specifically left open the opportunity for Chicago Title to present detailed evidence as to which fees were attributable to covered claims, and which were not: "If, at a later time, Defendant can carry its heavy burden and demonstrate allocability, the court will allocate expenses." *Id.*

The District Court did not determine that it was Chicago Title's burden to make a causal link between the fees and costs claimed and the defense of a covered claim – it would be nonsense to require the defending party to meet that burden because it would have no incentive to do so. It was not until the close of Petitioner's case – after Petitioner had failed to present evidence of a "causal link" – that the District Court was forced to make a difficult, but correct, decision on the legal effect of Petitioner's failure.

The Petition for Writ of Certiorari omits from the Writ many citations of applicable Hawai'i law which were followed by the District Court and Ninth Circuit. In Hawai'i, a plaintiff seeking to recover fees and costs as damages must establish that the fees and expenses were the natural and necessary consequences of the defendant's breach. *Montalvo v. Lapez,* 77 Hawai'i 282, 296, 884 P.2d 345, 359 (1994) (stating general rule that in order to recover damages, a plaintiff has the burden of proving that the damages were legally caused by defendant); *Uyemura v. Wick,* 57 Haw. 102, 109, 551 P.2d 171, 176 (1976) (legal fees incurred by plaintiff in litigation with third party awarded as damages); *Sharp v. Hui Wahine,* 49 Haw. 241, 413 P.2d 242 (1966) (self-serving opinions as to reasonableness of attorneys' fees held insufficient to meet the burden of proof).

Hawai'i law requires that the initial burden to show legal cause be met by plaintiff's introduction of admissible, competent evidence which furnishes a basis for the assessment of damages. *Malani v.*

Clapp, 56 Haw. 507, 517-518, 542 P.2d 1265, 1271-1272 (1975) (burden on plaintiff to provide competent evidence of damages). Here, Petitioner was required to demonstrate by competent evidence that (1) attorneys' fees and costs were incurred; and (2) they were incurred for matters which should have been paid by Chicago Title in defense of covered claims. Petitioner failed to make this basic causal connection.

Petitioner's citations to *Prisco v. A. A. Carting Corp.,* 168 F.3d 593, 607 (2nd Cir. 1999) and *White v. Godinez,* 301 F.3d 796, 803 (7th Cir. 2002) are off point. The District Court did not disregard an earlier ruling nor revisit without notice an issue "which ultimately turned on the sufficiency of a party's evidence" after Petitioner put on her case. As demonstrated herein, the District Court's rulings were completely consistent. Further, the Ninth Circuit specifically recognized the District Court's decisions were consistent.[10]

The District Court correctly – and consistently – ruled that it was Petitioner's burden to show that the damages claimed were causally related to Chicago Title's failure to defend a covered claim and not from

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[10] Both *Prisco* and *White* are factually distinct from this case as well. In *Prisco,* the Court determined that because the plaintiff was not prejudiced, the alleged "change in position" was irrelevant in any event. *Prisco,* 168 F.3d at 607. *White* actually concerned the specific issue of the standard for adequate representation in the defense of murder charges, circumstances much different than those here. *White,* 301 F.3d at 800.

other causes or sources, *e.g.*, the prosecution of the Foreclosure, affirmative claims for money damages or other, noncovered claims. *AMFAC, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Haw. 85, 128, 839 P.2d 10, 17 (1992) (trial court abused its discretion in attorney fee award where it failed to offset damages before calculation). Likewise, the Ninth Circuit rightly affirmed the District Court's determination. Petitioner mischaracterizes the District Court's ruling as a "change," but Petitioner's position results from improperly blurring the line between (1) the cause of damage and (2) the reasonableness of the damage claim.

III. THE NINTH CIRCUIT CORRECTLY RECOGNIZED THE SUFFICIENCY OF THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS REGARDING PETITIONER'S CLAIM FOR A $295,877.20 JUDGMENT THAT "SHOULD HAVE" BEEN ENTERED, AND ADEQUATELY STATED ITS OWN DECISION

Petitioner argues she "had no idea" what the purported deficiencies of proof were, but Petitioner need look no further than the Findings of Fact and Conclusions of Law and Order of Dismissal filed July 15, 2005 (Petitioner's App. at pp. A-19 – A-25), where the District Court properly found:

> Because Plaintiffs failed to (1) provide proof of the reasonableness and necessity of the work performed; (2) submit evidence of a

> connection between the work done and the covered claims; and (3) show entitlement to the other requested damages, Defendant's Motion to Dismiss [pursuant to Rule 52(c) of the Federal Rules of Civil Procedure] is GRANTED.

Petitioner's App. at pp. A-19 – A-20.

The District Court was not required to guess what evidence Petitioner might have had available but failed to offer. Nor was the District Court obligated to instruct counsel how to present his case.

The Ninth Circuit considered and rejected Petitioner's claim for the $295,877.20 Deficiency Judgment against Kerr, and stated "the Morgans failed to prove with 'reasonable certainty,' (citation omitted) the value of their surrender of a claim which had previously been dismissed by the state court." Appx. A-3. There is no authority requiring the Ninth Circuit to say more, and Petitioner fails to cite any.

Petitioner cites only to *Pacific Frontier v. Pleasant Grove City,* 414 F.3d 1221, 1238 (10th Cir. 2005) for holding that proper judicial administration generally "favors" a remand to the District Court for initial examination, where an issue has been raised in but not ruled upon by a District Court. Here, however, the District Court obviously ruled on and articulated its reasons on the issues presented by Petitioner. Petitioner may not like the result, but the District Court's determinations were well founded, as properly acknowledged and affirmed by the Ninth Circuit.

Petitioner has demonstrated no compelling reason to grant the petition.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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(808) 524-1800

Attorneys for Respondent

APPENDIX

(Trial Exhibit 146)
5th CIRCUIT COURT
STATE OF HAWAII
FILED
'98 JUN 26 P2:34
LORNA M.L. CHING
CLERK

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
STATE OF HAWAII

ALBERT R. MORGAN, JR. and ALICE H. MORGAN, Trustees, of Morgan Family Revocable Living Trust under Agreement dated September 20, 1990, as amended, Plaintiffs,

vs.

EDGAR D. KERR, JR., husband of Gena Kerr; ROSETTA ANN DIMICELI, unmarried, aka ROSETTA SCOTT, ROSETTA COBLE and ROSETTA EHRHARDT KAUAI SERVICES, INC., a Hawaii corporation; DENNIS L. NIMKIE, an individual; GRETA L. NIMKIE, an individual; UNITED STATES OF AMERICA; PRINCEVILLE AT HANALEI COMMUNITY ASSOCIATION (Doe No. 1); COUNTY OF KAUAI (Doe No. 2); and DOES 3-50, Defendants.

CIVIL NO. 93-0199 (Foreclosure)
Trial: Week of 2/12/96
Hon. George M. Masuoka

ORDER GRANTING IN PART AND DENYING IN PART (1) DEFENDANT DIMICELI'S MOTION TO ALTER OR AMEND JUDGMENT AND FOR OTHER RELIEF, FILED APRIL 25, 1996; (2) DEFENDANT DIMICELI'S MOTION FOR RELIEF, FILED NOVEMBER 27, 1996; AND (3) PLAINTIFFS' MOTION FOR ENTRY OF FINAL DEFICIENCY JUDGMENT, FILED DECEMBER 5, 1996

Defendant Dimiceli's Motion to Alter or Amend Judgment and for Other Relief, filed April 25, 1996, came on for hearing before the Honorable George M. Masuoka, Judge of the above-entitled Court, on May 21, 1996. Steven B. Jacobson appeared for the Plaintiffs, Paul A. Schraff appeared for Defendant Dimiceli, and Joseph Kobayashi appeared as Commissioner.

Defendant Rosetta Ann Dimiceli's Motion for Relief, etc., filed November 27, 1996, and Plaintiffs' Motion for Entry of a Final Deficiency Judgment, etc., filed December 5, 1996, came on for hearing before the Honorable George M. Masuoka, Judge of the above-entitled Court, on January 7, 1997. Steven B. Jacobson appeared for the Plaintiffs and Paul A. Schraff appeared for Defendant Rosetta Ann Dimiceli.

The Court, having considered said Motions, the memoranda, affidavits, and arguments of counsel, having reviewed the records and files, and having determined that good cause has been shown; therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiffs shall have and recover from Defendants Edgar D. Kerr, Jr., Kauai Services, Inc., Dennis S. Nimkie and Gretta L. Nimkie, jointly and severally, the principal amount of $295,877.20, plus interest of $113.49 per day and attorneys' fees of $28.37 per day from and after July 2, 1996, until the date judgment is entered on this Order. Post-judgment interest shall run on the judgment as provided by law.

2. Plaintiffs shall have and recover from Defendant Dimiceli, jointly and severally with the defendants named in paragraph 1 above, the amount of $30,096.64. Said sum shall be applied to the amount that the defendants named in paragraph 1 owe to the plaintiffs. $30,096.64 is equal to 14 and 9/30 monthly payments of $2,104.66. Defendants Dimiceli was ordered to deposit these monthly payments with the Court, commencing on July 28, 1994, pending further orders of this Court, pursuant to this Court's Order Denying Plaintiff's Motion to Strike, filed on August 26, 1994, as a substitute for the payments required of Defendant Dimiceli under that Satisfaction Deed by and between Edgar D. Kerr, Jr., as Grantor, and Dimiceli, as Grantee, and recorded November 12, 1992 at the Bureau of Conveyances for the State of Hawaii as Document No. 92-183386. The Nimkies occupied the subject property during the entire period of July 28, 1994 to December 7, 1995 and Dimiceli was entitled to collect rental proceeds of the subject property during that period. Two of these monthly payments were made on August 2 and September 12,

1994. Defendant Dimiceli was obligated to make these monthly payments until December 7, 1995, the date that the Order Granting Plaintiffs' Motion filed September 29, 1995, for Partial Summary and Default Judgment, Decree of Foreclosure and Order of Sale, etc. was filed in this Court.

3. In all other respects, the motions are DENIED.

4. There is no just reason for delay and the Court hereby directs the entry of this Order as a final judgment pursuant to Rule 54(b), Hawaii Rules of Civil Procedure.

5. The Fifth Claim for Relief in Plaintiffs' First Amended Complaint remains pending.

DATED: Lihue, Hawaii, June 26, 1998.

/s/ George M. Masuoka
Judge of the above-entitled Court

(Trial Exhibit 96)
5th CIRCUIT COURT
STATE OF HAWAII
FILED
'95 DEC 7 A10:39
LORNA M.L. CHING
CLERK

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
STATE OF HAWAII

ALBERT H. MORGAN, JR. and ALICE H. MORGAN, Trustees, of the Morgan Family Revocable Living Trust under agreement dated September 20, 1990 as amended, Plaintiffs,

vs.

EDGAR D. KERR, JR., husband of Gena Kerr, ROSETTA ANN DIMICELI, unmarried, also known as ROSETTA SCOTT, ROSETTA COBLE and ROSETTA EHRHARDT; KAUAI SERVICES, INC., a Hawaii corporation; DENNIS S. NIMKIE, an individual; GRETA L. NIMKIE, an individual; UNITED STATES OF AMERICA; PRINCEVILLE AT HANALEI COMMUNITY ASSOCIATION (DOE NO. 1); COUNTY OF KAUAI (DOE NO. 2); and DOES 3-50, Defendants.

CIVIL NO. 93-0199 (Foreclosure)
First Motion Heard: October 9, 1995
Time: 1:00 pm.
Judge: Hon. George M. Masuoka

NO TRIAL DATE SET

ORDER (1) GRANTING PLAINTIFFS' MOTION FILED SEPTEMBER 29, 1995, FOR PARTIAL SUMMARY AND DEFAULT JUDGMENT, DECREE OF FORECLOSURE AND ORDER OF SALE, AND (2) DENYING DEFENDANT DIMICELI'S NON-HEARING MOTION, FILED OCTOBER 16, 1995, TO MODIFY AUGUST 26, 1994 ORDER

Plaintiffs' Motion For Partial Summary and Default Judgment, Decree of Foreclosure and Order of Sale, filed in this action on September 29, 1995 ("First Motion"), came on for duly noticed hearing before the Honorable George M. Masuoka, Judge of the above-entitled Court, on October 9, 1995.

Steven B. Jacobson appeared before Plaintiffs Albert H. Morgan, Jr. and Alice H. Morgan, Trustees of the Morgan Family Revocable Living Trust under agreement dated September 20, 1990 as amended ("Plaintiffs"). Paul A. Schraff appeared for Defendant Rosetta Ann Dimiceli ("Dimiceli"). No other appearances were made.

Defendant Dimiceli's Motion to Modify August 26, 1994 Order, filed October 16, 1995 as a non-hearing motion ("Second Motion"), has also come on for consideration by the Honorable George M. Masuoka, Judge of the above-entitled Court.

Upon careful consideration of the moving, responding and supplemental papers, and the oral arguments of counsel as to the First Motion, there being no genuine issues of fact as to the relief sought in the First Motion and Plaintiffs being entitled to

such relief as a matter of law, the Court hereby GRANTS the First Motion, DENIES the Second Motion as moot in light of the granting of the First Motion, and FINDS, CONCLUDES, ORDERS, EXPRESSLY DETERMINES and EXPRESSLY DIRECTS as follows:

FINDINGS OF FACT

1. Plaintiffs have and hold, as mortgagees, a first mortgage lien upon the real property commonly known as 5095 Napo'okala Circle, Princeville, Kauai, Hawaii, legally described in Exhibit A hereto ("Property"), under a mortgage recorded in the Bureau of Conveyances of the State of Hawaii ("Bureau of Conveyances") on January 10, 1992, as Document No. 92-003636 ("Mortgage").

2. At the time the Mortgage was recorded, Defendant Edgar D. Kerr, Jr. ("Kerr") owned and held record title to the Property. Defendant Kerr executed the Mortgage, as mortgagor, in favor of Plaintiffs.

3. The Mortgage was recorded to secure the performance of Defendant Kerr's obligations to Plaintiffs under a promissory note from Kerr to Plaintiffs dated December 30, 1991, in the principal amount of $300,000 ("Note").

4. $291,878.88 of the $300,000.00 loaned by Plaintiffs to Kerr was not paid to him, but rather used for the benefit of the Property. That amount was used to satisfy previous mortgage loans secured by

the Property ($267,770.98), or to pay unpaid real property taxes ($862.00), loan and escrow costs ($20,679.18), and prepaid interest ($2,566.74). The mortgage loans repaid with Plaintiffs' loan largely replaced earlier loans to which Defendant Dimiceli had agreed and consented, and/or which Dimiceli had helped Kerr to obtain.

5. On or about May 9, 1992, Defendants Kerr and Dimiceli entered into a written Agreement of Sale ("Agreement of Sale I") in which Kerr agreed to sell his interests in the Property to Dimiceli. In Agreement of Sale I, Kerr and Dimiceli expressly recognized the existence and prior recording of Plaintiffs' Mortgage by describing the real property Kerr was agreeing to sell and Dimiceli was agreeing to buy as being "subject to" Plaintiffs' Mortgage, and by expressly agreeing that Dimiceli's rights under Agreement of Sale I were "subject to" Plaintiffs' Mortgage, among other provisions. Agreement of Sale I was recorded in the Bureau of Conveyances on July 28, 1992 as Document No. 92-121191. The term of Agreement of Sale I modified and superseded any differing terms in any prior agreements between Kerr and Dimiceli.

6. On or about November 2, 1992, Defendant Dimiceli and Kerr entered into a Satisfaction Deed agreement modifying Agreement of Sale I. In the Satisfaction Deed agreement, Kerr agreed to transfer record title to the Property to Dimiceli, subject to Plaintiffs' Mortgage. Kerr agreed to do so, even though Dimiceli had not yet paid the principal and

other amounts she had agreed to pay to Kerr under Agreement of Sale I, in return for Dimiceli's promise to pay all such amounts to Plaintiffs instead, in partial satisfaction of the obligations to Plaintiffs secured by Plaintiffs' Mortgage.

7. The Satisfaction Deed agreement was recorded in the Bureau of Conveyances on November 12, 1992 as Document No. 92-182386. It transferred record title to the Property to Dimiceli, subject to the Mortgage. Dimiceli has owned and held record title to the Property since November 12, 1992, subject to the Mortgage.

8. On or about February 1, 1993, Defendants Dimiceli, Kauai Services, Inc. ("Kauai Services"), Dennis S. Nimkie and Greta L. Nimkie (the latter two, collectively, "Nimkies") entered into an unrecorded Agreement of Sale ("Agreement of Sale II") in which Dimiceli agreed to sell an undivided two-thirds interest in the Property to Kauai Services, and granted Kauai Services an option to purchase the remaining one-third interest, in return for Kauai Services' promise to cause repayment of the $300,000 principal balance of Plaintiffs' Mortgage. The provisions of Agreement of Sale II included a personal guaranty of Kauai Services' obligations thereunder by the Nimkies. Nimkies have occupied the Property since February 1993.

9. On March 15 and 16, 1993, the Administrator of the Small Business Administration ("SBA"), as mortgagee, recorded mortgages against the Property

in the Bureau of Conveyances as Document Nos. 95-040787 and 93-041675 ("SBA Mortgages"). The SBA Mortgages had been executed by Dimiceli as mortgagor.

10. On August 26, 1994, in this action, this Court ordered Dimiceli and the Nimkies to make monthly payments of $2,104.66 to the Clerk of the Court, from and after July 28, 1994, pending further Orders of the Court. $2,104.66 is the amount of the monthly payment Dimiceli originally agreed to make to Kerr under Agreement of Sale I, and thereafter agreed to make to Plaintiffs under the Satisfaction Deed agreement.

11. On November 14, 1994, Defendant Princeville at Hanalei Community Association (Doe No. 1) ("Association") recorded notice of a $654.66 lien against the Property in the Bureau of Conveyances, as Document No. 94-191850, for allegedly unpaid community association dues.

12. On March 15, 1995, Defendant County of Kauai (Doe NO. 2) recorded a $3,883.17 lien against the Property in the Bureau of Conveyances, as Document No. 95-041019, for unpaid real property taxes due and owing for the 1993-1994 and 1994-1995 property tax periods.

13. On May 24, 1995, Plaintiffs recorded a notice of the pendency of this action in the Bureau of Conveyances as Document No. 95-069240. No liens or encumbrances, other than those listed in Exhibit A or in the foregoing paragraphs, had been recorded

against the Property prior to the recording of the notice of pendency of action.

14. The obligations owed to Plaintiffs under the Note and Mortgage have been defaulted upon. Payments due thereunder have not been made, property insurance policies with loss payable clauses payable to Plaintiffs have not been procured, and the Property has become subject to liens because of non-payment of community association dues and property taxes.

15. Defendant Kerr now owes Plaintiffs the following amounts under the Note and Mortgage, plus attorneys' fees and other costs of suit, the amounts of all unpaid community association dues and property taxes, and interest at a daily rate of $115.09 ($300,000 x 14% x 1/365 days) from and after July 9, 1995:

Principal	$300,000.00
Interest through July 9, 1993	3,835.62
Late Fees	24,586.85
Interest From July 9, 1993 Through July 8, 1995	64,390.68
Preliminary Title Report	553.50
Insurance	2,776.00
Service Charge	1,035.00
TOTAL	$397,177.65

16. The obligations Defendant Dimiceli owes Plaintiffs under the Satisfaction Deed agreement have been defaulted upon, and had been defaulted upon prior to the entry of this Court's Order of August 26, 1994, and Dimiceli now owes Plaintiffs

the following amounts thereunder, plus attorneys' fees and costs of suit, the amounts of unpaid community association dues and property taxes, and interest at a daily rate of $66.60 per day ($221,000 x 11% ÷ 365 days) from and after July 28, 1995:

Interest Due Prior to July 28, 1994	$ 10,569.90
Principal Balance Due July 28, 1994	221,000.00
Interest Due July 28, 1994 through July 27, 1995	21,046.60
Late Fees	24,586.85
TOTAL	$277,203.35

17. The obligations of Defendant Dimiceli and Nimkies under this Court's Order of August 26, 1994, have been defaulted upon, in that Dimiceli and the Nimkies failed to make the $2,104.66 monthly payments due September 28, 1994, and have failed to make all monthly payments due after that date.

18. Defendant Kerr's default in responding to Plaintiffs' Complaint was entered on September 30, 1993. The defaults of Defendant Association and Kauai Services in responding to Plaintiffs' First Amended Complaint were entered on October 13, 1995. The defaults of the Defendant Nimkies in responding to Plaintiffs' First Amended Complaint were entered on November 16, 1995.

19. On April 3, 1995, this Court entered its Order Granting Defendant United States of America's

Motion For Partial Summary Judgment in this action, establishing various matters.

CONCLUSION OF LAW

1. Plaintiffs' Mortgage constitutes a valid priority lien on the Property, binding upon and prior to the interests of all of the Defendants herein, save and except liens of Defendant County of Kauai for unpaid real property taxes, and subject only to certain prior reservations, declarations, restrictions, covenants, conditions and rights of entry described in Exhibit A.

2. Plaintiffs are third-party creditor beneficiaries of Dimiceli's promise, in the Satisfaction Deed agreement, to pay them the amounts she had previously agreed to pay to Kerr in Agreement of Sale I, in order to partially satisfy Kerr's obligations to Plaintiffs, and in return for Kerr's intermediate transfer of record title to her.

3. If Agreement of Sale II is still in effect, Plaintiffs are third-party creditor beneficiaries of Kauai Services' and Nimkies' promises, in Agreement of Sale II, to cause the payment of the $300,000 principal amount of the Mortgage.

4. To the extent the $300,000.00 they loaned to Kerr was used for the benefit of the Property, Plaintiffs are entitled to the imposition of an equitable mortgage or lien upon the Property, effective as of January 10, 1992, securing its repayment and the

payment of interest thereon and fees and costs incurred in collection.

5. The lien of Plaintiffs' Mortgage (or equitable mortgage or lien) secures the performance of all obligations owed to Plaintiffs under the Note and Mortgage (or equitable mortgage or lien), including, but not limited to, those obligations which Defendant Dimiceli promised and agreed to partially satisfy, in the Satisfaction Deed agreement, in return for an immediate transfer of record title to the Property to her.

6. Given the terms to which Defendant Dimiceli agreed in Agreement of Sale I, the Satisfaction Deed agreement and Agreement of Sale II, Dimiceli cannot prevail on her defense that she and Kerr allegedly entered into an unrecorded DROA Agreement in March 1989, that the terms of the alleged unrecorded agreement prohibited Kerr from further mortgaging the Property without Dimiceli's consent, that Plaintiffs were subject to that provision because they allegedly were aware of Dimiceli's claim to equitable ownership of the Property under the unrecorded DROA Agreement, that Dimiceli did not consent in advance to the Mortgage, and that she can avoid the Mortgage for lack of such advance consent.

7. In any event, Plaintiffs were not on notice of any claim of Dimiceli to equitable ownership of the Property, under an unrecorded 1989 DROA Agreement or otherwise.

8. The obligations owed to Plaintiffs and secured by the Mortgage (or equitable mortgage or lien) have been defaulted upon. As a result, Plaintiffs are entitled to foreclose the Mortgage, to have the property sold in the manner provided by law subject only to the prior liens and encumbrances described above in paragraph 1 of these Conclusions, and to obtain monetary judgments against Defendants Kerr and Dimiceli, and perhaps Defendants Kauai Services and Nimkies (if Agreement of Sale II is still in effect), for any deficiencies remaining after the closing of the sale.

9. Defendant Kerr now owes Plaintiffs the following amounts under the Note and Mortgage, plus attorneys' fees and other costs of suit, the amounts of all unpaid community association dues and property taxes, and interest at a daily rate of $115.09 ($300,000 x 14% x 1/365 days) from and after July 9, 1995:

Principal	$300,000.00
Interest through July 9, 1993	3,835.62
Late Fees	24,586.85
Interest From July 9, 1993 Through July 8, 1995	64,390.68
Preliminary Title Report	553.50
Insurance	2,776.00
Service Charge	1,035.00
TOTAL	$397,177.65

10. Defendant Dimiceli now owes Plaintiffs the following amounts under the Satisfaction Deed agreement, plus attorneys' fees and costs of suit, the

amounts of all unpaid community association dues and property taxes, and interest at a daily rate of $66.60 per day ($221,000 x 11% ÷ 365 days) from and after July 28, 1995:

Interest Due Prior to July 28, 1994	$ 10,569.90
Principal Balance Due July 28, 1994	221,000.00
Interest Due July 28, 1994 through July 27, 1995	21,046.60
Late Fees	24,586.85
TOTAL	$277,202.00

11. The amounts deposited by Dimiceli and/or Nimkies with the Clerk of the Court, and now held by Clerk of the Court, should be paid to the County of Kauai as soon as possible, to be credited against the outstanding real property taxes owed on the Property.

EXPRESS DETERMINATIONS AND EXPRESS DIRECTIONS

1. There is no just reason for delay in the entry of a final judgment, including a final decree of foreclosure and a final order of sale, as to all matters resolved (a) in this Order and (b) in this Court's Order filed April 3, 1995, granting Defendant United States of America's Motion For Partial Summary Judgment.

2. Final judgment shall therefore be entered as to all such matters pursuant to H.R.C.P. Rule 54(b).

DATED: Lihue, Hawaii, Dec. 7, 1995.

/s/ George M. Masuoka
Judge of the above-entitled Court

EXHIBIT "A"
(MORTGAGED PROPERTY)

All of that certain parcel of land situate at Hanalei, Halelea, County of Kauai, State of Hawaii, described as follows:

Lot 22, area 15,458 square feet, more or less, as delineated on the map entitled "PRINCEVILLE AT HANALEI", which said map was filed in the Bureau of Conveyances of the State of Hawaii as File Plan No. 1557.

TOGETHER WITH nonexclusive appurtenant easement for road purposes, over, across, along and upon the roadway lots shown on File Plan Nos. 1179, 1181 and 1557; provided, however, that in the event said lots or any portion thereof is conveyed to the State of Hawaii, County of Kauai or to any other governmental authority, said easement as to the lot or lots so conveyed shall immediately terminate.

TOGETHER ALSO WITH nonexclusive appurtenant easement to use for recreational purposes Lot 27, area 42,221 square feet, as shown on said File Plan No. 1557, subject to and with the benefit of the Declaration of Restrictions, Covenants and Conditions dated May 25, 1978, and recorded in the Bureau of Conveyances of the State of Hawaii in Liber 12921

Page 620 and all rules and regulations now or hereafter made by the Sunset Drive Community Association.

SUBJECT, HOWEVER, to the following:

1. DECLARATION OF RESTRICTIONS, COVENANTS AND CONDITIONS

Dated:	March 1, 1971
Recorded:	March 12, 1971
Book:	7444
Page:	93

to which reference is hereby made. (as amended)

DECLARATION OF DECLARANT

Dated:	May 10, 1985
Recorded:	May 21, 1985
Book:	18662
Page:	485

to which references is hereby made.

Notice of Transfer and Assignment dated May 1, 1990, recorded on August 7, 1990 in the Bureau of Conveyances of the State of Hawaii as Document No. 90-120777.

2. DECLARATION OF RESTRICTIONS, COVENANTS AND CONDITIONS OF SUNSET DRIVE SUBDIVISION

Dated:	May 25, 1978
Recorded:	May 30, 1978
Book:	12921
Page:	620
	to which reference is hereby made.

3. RIGHT-OF-ENTRY

In Favor Of: CITIZENS UTILITIES COMPANY

Dated:	July 6, 1979
Recorded:	August 28, 1979
Book:	13944
Page:	390
Purposes:	Granting a right-of-entry for utilities purposes.

4. Waiver and Release dated March 18, 1990, recorded on May 9, 1990 in the Bureau of Conveyances of the State of Hawaii in Book 23160 Page 690.